

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Patent Application of

Reid W. von Borstel, et al

Atty. Ref.: 1331-334

Serial No. 09/763,955

TC/A.U.: 1623

Filed: February 28, 2001

Examiner: Lewis, P.T.

For: PYRIMIDINE NUCLEOTIDE PRECURSORS FOR TREATMENT OF
SYSTEMIC INFLAMMATION AND INFLAMMATORY HEPATITIS

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August 4, 2009

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

REPLY BRIEF

Sir:

Appellant hereby replies to the Examiner's Answer mailed June 4, 2009.

I. THE EXAMINER'S POSITION

In the "Response to Argument" section of the Examiner's Answer (page 8), the Examiner states:

"....Applicant contends that DiMauro notes the "enormous progress" made since Luft's initial work; however, applicant concedes that the DiMauro reference was published about a year after the priority date of the subject application."

II. APPELLANT'S REPLY

DiMauro discloses that:

“...enormous progress achieved in the 38 years since Luft and coworkers introduced the concept of mitochondrial disease...even in the 12 years since the description of pathogenic mtDNA mutations.” (DiMauro, page 2)

Thus, even though DiMauro was published after the priority date of the present application, one of ordinary skill would **not** have viewed Przyrembel (1987) as indicative of the state of the art against which the presently claimed invention should be gauged. One of ordinary skill would have recognized that Przyrembel (1987) was published at a very early stage in the understanding of mitochondrial diseases and their treatment and that, based on DiMauro, the skilled artisan would have understood that significant progress has been made since 1987 in the understanding of mitochondrial diseases and their treatment. DiMauro notes the “enormous progress” is the **over the course of the 38 years since Luft's initial work**, not just after the filing date of the present application or after the publication of Di Mauro. One of ordinary skill would therefore have viewed DiMauro as clear evidence of the developments made in this art during the period between publication of Przyrembel (1987) and the priority date of the subject application. Based on DiMauro, the person of ordinary skill in the art would not have considered Przyrembel (1987) as a reliable guide to the state of the art immediately preceding the effective filing date of the present application.

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For the reasons urged in the Appeal Brief and above, it is believed that the lack of enablement rejection should be reversed. Such action is respectfully requested.

Respectfully submitted,

NIXON & VANDERHYE P.C.

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